No. 06-359

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Supreme Court of the United States

DAVIESS COUNTY, KENTUCKY,
Petitioner,

v.

NATIONAL SOLID WASTES
MANAGEMENT ASSOCIATION
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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BRIEF *AMICI CURIAE* OF THE
BRISTOL RESOURCE RECOVERY FACILITY OPERATING COMMITTEE, CAPE MAY COUNTY MUNICIPAL UTILITIES AUTHORITY, DELAWARE COUNTY SOLID WASTE AUTHORITY, GREATER LEBANON REFUSE AUTHORITY, MONTGOMERY COUNTY, OHIO, SNOHOMISH COUNTY, WASHINGTON, SOLID WASTE AUTHORITY OF CENTRAL OHIO, SOLID WASTE DISPOSAL AUTHORITY OF THE CITY OF HUNTSVILLE, ALABAMA, SPOKANE REGIONAL SOLID WASTE SYSTEM, and the YORK COUNTY SOLID WASTE AND REFUSE AUTHORITY
IN SUPPORT OF PETITIONER

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Amici curiae Bristol Resource Recovery Facility Operating Committee, *et al.*, submit this brief in support of Petitioner Daviess County, Kentucky.[1] Daviess County's

[1] No portion of this brief was authored by counsel for a party, and no person or entity other than the *amici curiae* has made a monetary contribution to the preparation or submission of this brief. The Petitioner and Respondent have each consented to the filing of this brief and their respective letters of consent have been filed with the Clerk of the Court.

petition for a writ of certiorari seeks review of *National Solid Wastes Management Ass'n v. Daviess County, Kentucky*, 434 F.3d 898 (6th Cir. 2006) (App. to Pet. for Writ of Cert. ("App.") 1a-26a), in which the Sixth Circuit affirmed a district court order enjoining enforcement of Daviess County's "flow control" ordinance for management of municipal solid waste generated by the county's residents and businesses. The Daviess County ordinance requires waste haulers, such as Respondent's members, that collect municipal solid waste in Daviess County to deliver that waste to the county's publicly-owned waste management facilities.[2] The Sixth Circuit's decision invalidating Daviess County's flow control ordinance conflicts with the Second Circuit's decisions in *United Haulers Ass'n v. Oneida-Herkimer Solid Waste Management Authority*, 261 F.3d 245 (2d Cir. 2001) (*Oneida-Herkimer I)* and 438 F.3d 150 (2d Cir. 2006) (*Oneida-Herkimer II*), *cert. granted*, 2006 U.S. LEXIS 5414 (U.S., Sept. 26, 2006) (No. 05-1345).

STATEMENT OF INTEREST OF *AMICI*

Amici are local government authorities, counties and cities that have principal responsibility for municipal solid waste management in their respective communities. *Amici's* responsibilities are similar to those of Petitioner Daviess County, which has primary responsibility under Kentucky law for managing all municipal solid waste generated by the county's residents and businesses. Ky. Rev. Stat. Ann. § 109.011(6); *see also id.* §§ 67.083(3)(o) and 109.041(1) (counties' "governmental functions" include "[e]xclusive management of solid wastes by ordinance or contract or both" and "in the implementation, acquisition, financing, and maintenance of solid waste management facilities, and in the enforcement of their use, counties will be performing state

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[2] The term "municipal solid waste" refers to "residential and commercial solid wastes generated within a community." 40 C.F.R. § 240.101(q).

functions duly delegated to them for the public welfare."). Kentucky law also required Petitioner to develop a comprehensive waste management plan, which must include specific provisions to assure adequate waste management capacity. *Id.* § 224.43-345(1)(*l*)

To implement these responsibilities, Daviess County adopted a flow control ordinance, Ordinance KOC 830.5, which designated the county's publicly owned landfill for disposal of all non-recyclable waste. The ordinance was challenged in federal district court by Respondent, an association of privately-owned waste haulers and waste disposal facility operators, as allegedly discriminating against interstate commerce in violation of the Commerce Clause (U.S. Const. art. I, § 8, cl. 3). Citing this Court's decision in *C&A Carbone, Inc. v. Clarkstown, New York*, 511 U.S. 383 (1994), the district court agreed with Respondent's argument. In that regard, the district court rejected Daviess County's reliance on the Second Circuit's *Oneida-Herkimer I* decision. *Oneida-Herkimer I* ruled that a flow control ordinance designating publicly owned facilities for management of the affected community's solid waste is not facial discrimination under the dormant Commerce Clause, and should instead be evaluated under *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970), to determine whether the burden, if any, the ordinance imposes on interstate commerce is clearly excessive in relation to the local benefits provided. Daviess County appealed to the Sixth Circuit, and that court affirmed the district court. Rejecting the contrary conclusion in *Oneida-Herkimer I*, the Sixth Circuit ruled that Daviess County's ordinance constituted facial discrimination against interstate commerce.

Although not considered by the Sixth Circuit, this Court has long recognized that authority over solid waste management is inherent in the police power of local government. *Cal. Reduction Co. v. Sanitary Reduction Works*, 199 U.S. 306 (1905); *Gardner v. Mich.*, 199 U.S. 325

(1905). The Resource Conservation and Recovery Act (RCRA) codifies the Court's longstanding recognition of that core local government responsibility, *see* 42 U.S.C. § 6901(a)(4) ("the collection and disposal of solid wastes should continue to be primarily the function of State, regional, and local agencies"), as do the laws of essentially every state.

Because the Nation's growing waste stream requires comprehensive planning by local government to address the broad range of public health, environmental and economic issues involved, a principal RCRA objective is the statute's prescription for detailed state and local solid waste management planning, including emphasis on assuring capacity adequate to meet the affected communities' "present and reasonably anticipated future needs." *Id.* § 6941; *see also id.* §§ 6902(a)(1), 6942 and 6943.[3] Such planning must address the broad range of public health, environmental and economic issues involved, and "present[s] these communities with serious financial, management, intergovernmental, and technical problems." *See id.* § 6901(a)(3). To effectuate their waste management decisions and secure financing for facility development, many local governments, including each of the *amici*, have enacted flow control ordinances; the ordinances implement

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[3] The volume of MSW generated in the United States has increased by more than 50 percent since 1980, exceeding 236 million tons in 2003 (the most recent year for which national data are available). *See Municipal Solid Waste in the United States: 2003 Facts and Figures*, U.S. EPA, *available at* http://epa.gov/epaoswer/non-hw/muncpl/pubs/msw05rpt.pdf. The U.S. Environmental Protection Agency (EPA) has noted RCRA's "great emphasis" on state, regional and local planning, which, among other things, "must provide for adequate recycling and disposal capacity and must address [waste management] facility planning and development." *Report to Congress on Flow Controls and Municipal Solid Waste*, EPA 530-R-95-008, U.S. EPA (Mar. 1995), at I-2, *available at* http://www.epa.gov/epaoswer/non-hw/muncpl/flowctrl.htm (cited below as "*Report to Congress on Flow Control*").

the affected local governments' determinations regarding the facilities that will best achieve the waste management strategies selected by their respective communities.

In that regard, state laws authorizing local government to adopt flow control ordinances emphasize protection of public health and the environment and comprehensive planning as the predicates for exercising flow control authority. Thus, in the exercise of inherent police power authority to determine the waste management system and facilities best suited for their communities (whether a recycling center, resource recovery – also referred to as "waste-to-energy" – facility, composting plant, waste transfer station or another type of waste management infrastructure), *amici's* flow control ordinances implement those decisions in the interest of public health and environmental protection, and assist in financing the costly, environmentally advanced infrastructure selected. Although it is not necessary to address here the circumstances surrounding each of the *amici's* use of flow control (descriptions of the *amici* are in the Appendix to this brief), *amici* would note that since 1980 a considerable number of local governments have issued, in reliance on flow control authority, more than $20 billion in bonds for the construction of state-of-the-art, environmentally protective waste management infrastructure.[4] Such environmentally advanced waste management systems are quite expensive and often extremely difficult to develop and operate without use of flow control.

These factors represent a reality of solid waste management which may be referred to as "The Second Law

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[4] *Hearing on Flow Control Laws and Proposals to Regulate the Interstate Transportation of Municipal Solid Waste Before the Senate Comm. on Environment and Public Works*, 105th Cong. (Mar. 18, 1997) (Testimony of Randy Johnson, Chair, Board of County Commissioners Hennepin County, Minnesota and President-Elect, National Association of Counties).

of Garbage": more specifically, absent government intervention, waste management will generally default to the lowest cost (in terms of short-term costs) and frequently less environmentally sound alternatives. *See Facing America's Trash: What Next For Municipal Solid Waste?*, U.S. Congress, Office of Technology Assessment, at 275 (Oct. 1989).[5] Flow control changes that dynamic by facilitating implementation of the waste management infrastructure alternatives selected by the affected community. While the community's choices may self-impose higher short-term expense, the use of flow control is a highly cost effective and efficient means for the community to counteract the attraction of the lower short-term costs of environmentally less preferable alternatives.

This is the context in which the Second Circuit concluded in *Oneida-Herkimer I* that *C&A Carbone* supports the position that a flow control ordinance's designation of publicly owned waste management facilities is not facial discrimination under the Commerce Clause. *See also Oneida-Herkimer II*, 438 F.3d at 162-63 ("[N]othing in the record before us demonstrates, or even suggests, that the Counties could address their liability concerns or encourage recycling across the wide range of waste products accepted by the Authority's recycling program in any other way, let alone through an approach as straightforward as the use of flow control."). In the decision below, however, the Sixth Circuit disagreed with *Oneida-Herkimer I*. Although the Sixth Circuit critiqued the Second Circuit's parsing of this Court's opinion in *C&A Carbone*, *see* 434 F.3d at 910, App. 22a, the Sixth Circuit sidestepped the Second Circuit's more important point, specifically, this Court's rationale in *C&A*

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[5] Those involved in solid waste management describe the "First Law of Garbage" as follows: "Everybody wants us to pick it up, and nobody wants us to put it down." *The Solid Waste Dilemma: An Agenda for Action*, U.S. Environmental Protection Agency, EPA/530-SW-8-019, at 8 (Feb. 1989) (cited below as "*Agenda for Action*").

Carbone, which placed heavy reliance on a considerable body of precedent, the "local processing cases," in which state laws were found to be facially discriminatory because they favored particular categories of private business activity within the enacting state and similarly disadvantaged private business activity located out-of-state.

The Sixth Circuit attempted to buttress its position by suggesting that local government responsibility for solid waste management is synonymous with "a local business in the local industry of waste disposal." 434 F.3d at 912, App. 26a. The Sixth Circuit repeated its position in several different ways, as follows:

> A municipality can be considered a local business in competition with out-of-state businesses, and a municipality can participate in local enterprise.
>
> . . .
>
> But again, Daviess County is acting as a local business in the local industry of waste disposal. Not to belabor the point, but under the Ordinance, [Daviess County] would be acting in a dual role: as a local business selling waste disposal services, and as a local government hoarding "waste, and the demand to get rid of it, for the benefit" of this business.

Id. at 911-12; App. 23a, 25a-26a.[6] Suggesting that its position is required by *C&A Carbone*, the Sixth Circuit rejected the Second Circuit's conclusion in *Oneida-Herkimer I* that a flow control ordinance's designation of the affected community's publicly owned facilities for management of

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[6] Although the Sixth Circuit's rationale appears to be based on facial discrimination, the court suggests that "the crux of the inquiry is whether the local ordinance *burdens* interstate commerce." 434 F.3d at 911, App. 22a (emphasis added). *See General Motors Corp. v. Tracy*, 519 U.S. 278, 298-300 (1997) (describing the meaning of discrimination for purposes of dormant Commerce Clause analysis).

the community's waste, to the exclusion of all private businesses, in-state as well as out-of-state, does not constitute facial discrimination under the dormant Commerce Clause. As *amici* show below, the Sixth Circuit's position is not required by this Court's decision in *C&A Carbone* and reflects a serious misunderstanding of local government responsibility for solid waste management as well as the manner in which that responsibility relates to the dormant Commerce Clause.

SUMMARY OF ARGUMENT

The Sixth Circuit's premise is that when a local government, such as Daviess County, uses flow control to implement state law responsibilities for solid waste management it "is acting as a local business in the local industry of waste disposal." That premise is fundamentally incorrect. Thus, contrary to the decision below, this Court's dormant Commerce Clause jurisprudence has consistently emphasized that discrimination against interstate commerce is predicated on favoritism extended to local (in-state) *private businesses* at the expense of similarly situated out-of-state *businesses*, and the imposition of a burden on interstate commerce that commerce within the state does not bear. Here, however, the flow control ordinance does not involve any such favoritism or disparate burden. Nor is there anything in the implementation of local government's core responsibility for solid waste management that bears any resemblance to the entrepreneurial activity of private businesses engaged in solid waste collection and disposal. Moreover, communities that rely on flow control provide distinctly different and considerably more comprehensive waste management services in comparison to the narrower waste collection-disposal service that Respondent's members provide. Those differences further preclude Respondent's claim of discrimination.

ARGUMENT

The Sixth Circuit Misapprehends Local Government Responsibility For Solid Waste Management And Its Relationship To This Court's Dormant Commerce Clause Jurisprudence

1. As an initial matter, it should be emphasized that local government responsibility for solid waste management, including the use of flow control authority, is precisely the opposite of the for-profit, entrepreneurial activity that is traditionally performed by private corporations. Thus, as noted above, solid waste management has longstanding recognition as a core function of local government. *See Cal. Reduction Co. v. Sanitary Reduction Works*, 199 U.S. 306; *Gardner v. Mich.*, 199 U.S. 325; *see also City of Philadelphia v. New Jersey*, 437 U.S. 617, 621 n.4 (1978); *USA Recycling, Inc. v. Town of Babylon*, 66 F.3d 1272, 1275 (2d Cir. 1995) (it is settled law that "garbage collection and disposal is a core function of local government in the United States"); *Harvey & Harvey, Inc. v. County of Chester*, 68 F.3d 788, 804 (3d Cir. 1995) (local governments' authority for exercise of their police powers "are at their strongest in the health and safety area"); 42 U.S.C. § 6901(a)(4), *supra* (solid waste collection and disposal is "primarily" a state and local function).

The core local government responsibility for solid waste management recognized in RCRA is implemented through state law. Given the scores (if not hundreds) of applicable state laws, suffice it to say that state codes routinely mandate that local government is responsible for solid waste management. *See, e.g.*, 53 Pa. Cons. Stat. §§ 4000.303(a), 4000.304(a) (Pennsylvania municipalities have primary responsibility for processing and disposal of locally generated municipal waste); Wash. Rev. Code §§ 70.95.080 and 70.95.090(3) (each county to prepare a comprehensive solid waste management plan including "a program for the

orderly development of solid waste handling facilities in a manner consistent with plans for the entire county"); *see also* Conn. Gen. Stat. § 22a-220 (each municipality responsible for arranging for solid waste collection and disposal). These laws impose detailed planning and related responsibilities to assure adequate, environmentally protective waste management capacity. *See, e.g.,* Wash. Rev. Code § 70.95.010(6)(c) (county and city governments to assume primary responsibility for solid waste management and to develop and implement aggressive waste reduction and source separation strategies); Ohio Rev. Code Ann. §§ 3734.52(A) and (B), 3734.55 (each county required to participate in a solid waste district for the purpose, among other things, of preparing a solid waste management plan providing for proper management of municipal solid waste).[7] This delegation of solid waste management responsibility to local government is in furtherance of the states' police power authority for protection of public health, welfare, safety and the environment. *See, e.g.,* Ala. Code §§ 22-27-3 and 22-27-40(3); Conn. Gen. Stat. § 22a-258; N.J. Stat. Ann. § 13:1E-2(a); Ky. Rev. Stat. Ann. § 109.011(6).

It also bears emphasis that the predicate for exercising flow control authority under state codes is protection of public health and the environment and facilitating proper solid waste management. For example, as a prerequisite to exercise of flow control in Pennsylvania, a county's solid waste management plan must, among other things, "[e]xplain in detail the reason for selecting such facility," "provide reasonable assurances that the county utilized a fair, open and competitive process for selecting such facilities or

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[7] *See also* Ala. Code § 22-27-47(b)(8) (county and municipal solid waste management plans required to provide for development or expansion of management systems "in a manner consistent with the needs of the area" and "protection of air, water, land, and other natural resources."); N.J. Stat. Ann. § 13:1E-20 (each county required to develop and implement a comprehensive solid waste management plan).

programs from among alternatives which were suggested to the county," and "[e]valuate [for the affected facility] the environmental, energy, life cycle cost, [and] the costs of transportation . . . as well as the [costs of the] alternatives." *See, e.g.*, 53 Pa. Cons. Stat. § 4000.502(f). Similarly, under Ohio law a predicate for use of flow control is authorization as part of the solid waste management plan for the affected county, which, in turn, requires state and local approval after public notice and comment and annual review. Ohio Rev. Code Ann. §§ 343.013 and 3734.55. Under the comparable Wisconsin statute a prerequisite to a municipality's use of flow control is a finding that flow control "is in the best public interest," which in turn requires a determination that use of the designated waste management facility will, among other things, conserve energy or natural resources, lessen the demand for solid waste disposal facilities, and that the alternatives to use of flow control "have been compiled, analyzed and considered." Wis. Stat. § 287.13.[8]

2. The preceding points describe the context for the Second Circuit's conclusion in *Oneida-Herkimer I* that a flow control ordinance which directs solid waste to publicly owned waste management facilities does not constitute facial discrimination under the dormant Commerce Clause. As noted earlier, in reaching that conclusion the Second Circuit emphasized this Court's heavy reliance on the "local processing cases" in its decision overturning the flow control ordinance at issue in *C&A Carbone*.

As the Second Circuit explained, "in each and every one of the local processing cases the challenged laws favored a local private business, industry or investment (not a state-

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[8] *See also* Minn. Stat. § 115A.84, subd. 2 (exercise of flow control authority requires affected local government to prepare a plan demonstrating that flow control "will better serve to protect public health and safety" and is necessary, among other things, to achieve local waste management plans and policies).

owned facility or a public monopoly) to the detriment of out-of-state competitors." 261 F.3d at 260. The Second Circuit also noted that this body of considerable precedent consistently "evidence[s] the same intent to prevent state or local governments from favoring in-state business or investment at the expense of out-of-state businesses." *Id.* In addition, the court emphasized that "[t]he common thread in th[is] Court's dormant Commerce Clause jurisprudence, highlighted in the local processing cases. . . , is that a local law discriminates against interstate commerce when it hoards local resources *in a manner* that favors local business, industry or investment over out-of-state competition." *Id.* at 261 (emphasis in original). Although many (perhaps all) laws and regulations of state and local government can benefit the economic well being of the enacting jurisdictions' citizens, nothing in Daviess County's flow control ordinance, or any other flow control ordinance of which *amici* are aware, is designed to benefit in-state interests by burdening any out-of-state interest. *See Okla. Tax Comm'n v. Jefferson Lines, Inc.*, 514 U.S. 175, 179-80 (1995) (describing "the Commerce Clause's purpose of preventing a State from . . . plac[ing] burdens on the flow of commerce across its borders *that commerce wholly within those borders would not bear*") (emphasis added); *see also C&A Carbone*, 511 U.S. at 392 ("Put another way, the offending local laws hoard a local resource – be it meat, shrimp, or milk – for the benefit of local businesses that treat it.").

The importance of local government's traditional, core responsibility for solid waste management is all the more poignant to the issues in this case given the fundamental distinction between for-profit entrepreneurial activity and the public health and safety responsibilities that underlie flow control ordinances. Thus, regardless of restrictions that may arise under the dormant Commerce Clause when "the State is acting . . . [as] a traditionally 'private enterprise,'" such as "conduct that the State realistically could choose to abandon, that is undertaken for profit, that is traditionally performed

by private citizens and corporations, and that otherwise resembles the behavior of 'market participants,'" *see College Savings Bank v. Florida Prepaid Postsecondary Education Expense Board*, 527 U.S. 666, 684 (1999), none of those circumstances bear any resemblance to the use of flow control. To the contrary, the statutory obligations that local governments fulfill through the exercise of flow control authority are core governmental functions for protection of public health and welfare and are not, needless to say, a statutory obligation of any private enterprise engaged in solid waste collection or disposal. And in implementing its responsibilities, no local government can "pick out good portions of a particular territory, serve only select customers . . . , and refuse service to other users." *General Motors v. Tracy*, 519 U.S. at 297 (internal citation omitted); *see also*, *Reeves, Inc. v. Stake*, 447 U.S. 429, 447 n.1 (1980), Powell, J., dissenting ("By 'protectionism,' I refer to state policies designed to protect private economic interests within the State from the forces of the interstate market," and "I would exclude from this term policies relating to traditional governmental functions").[9] Simply put, local governments that rely on flow control do not undertake their solid waste management responsibilities for profit, entrepreneurial spirit or the like, but rather to satisfy one of their most basic governmental obligations.

3. Finally, the decision below is not in keeping with the Court's recognition in *General Motors v. Tracy* that under

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[9] Judge Calabresi's concurring opinion in *Oneida-Herkimer I* emphasizes the same point:

> I concur in both the result and the opinion. I do so because this case deals with waste processing by a publicly owned facility. Waste disposal is both typically and traditionally a local government function . . . . Whether the same analysis would apply to activities that are not traditionally governmental is not before us.

261 F.3d at 264.

the dormant Commerce Clause "any notion of discrimination assumes a comparison of substantially similar entities." 519 U.S. at 298. The Court addressed this matter as follows:

> Although this central assumption has more often than not itself remained dormant in this Court's opinions on state discrimination subject to review under the dormant Commerce Clause, when the allegedly competing entities provide different products, as here, there is a threshold question whether the companies are indeed similarly situated for constitutional purposes. This is so for the simple reason that the difference in products may mean that the different entities serve different markets, and would continue to do so even if the supposedly discriminatory burden were removed.

Id. at 298-99; *see generally id.* at 297-303. The importance of comparing substantially similar entities has particular application in the context of flow control. That is because communities which rely on flow control typically provide a comprehensive array of waste management services that go well beyond the narrower and allegedly competing waste collection-disposal service that underlies Respondent's claim of discrimination. *See* 434 F.3d at 901, App. 3a.

More specifically, the services provided by local governments that rely on flow control (including each of the *amici*) will typically comprise, in addition to disposal of non-recyclable waste, a number of environmentally-essential services such as recycling, household hazardous waste programs, yard waste collection and related educational programs. Such recycling and related services are referred to as "integrated waste management."[10] Because these services

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[10] As noted in EPA's *Agenda for Action* at 16, "'integrated waste management' [IWM] refers to the complementary use of a variety of waste management practices," including reuse of products, recycling of materials, waste-to-energy combustion and landfilling "to safely and

"generally do not lend themselves to generation of their own revenues," *Report to Congress on Flow Control* at ES-11 (*see also id.* at III-80), the affected local governments charge a "system" fee which, although imposed only on disposal of non-recyclable waste, supports the full array integrated waste management services provided. Thus, as explained in *The Cost of Flow Control*, New Hampshire Department of Environmental Services (Nov. 1995) (cited below as "*NHDES Report*"), the system fees charged by flow control-reliant communities will almost always recover, in addition to the cost to dispose of non-recyclable waste, the costs of environmentally-essential services such as recycling, household hazardous waste collection and public education. *NHDES Report* at 1.[11] The same point is addressed by EPA in its *Report to Congress on Flow Control*, which explains that "[d]ue to flow control," the system fees local governments use in conjunction with waste-to-energy facilities "often recover other municipal system costs (e.g., curbside recycling). In contrast, private regional landfills are more likely to set tipping fees at (lower) levels that recover disposal costs only." *Report to Congress on Flow Control* at III-51.[12]

Putting this matter in context, the *NHDES Report* emphasizes that the integrated waste management services

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effectively handle the municipal solid waste stream with the least adverse impact on human health and the environment."

[11] As required by Rule 32.3, on September 18, 2006 *amici* submitted a letter to the Clerk of the Court requesting permission to lodge the *NHDES Report* with the Court.

[12] "Tipping fee" refers to the waste disposal charge or gate fee at a disposal facility. *See Oneida-Herkimer I*, 261 F.3d at 249. The NHDES report also explains that because "[t]he public typically views IWM programs funded through [system] fees as a 'free' addition to locally provided waste management service . . . , they tend to use these programs more heavily than if recycling, HHW [household hazardous waste] collection, composting, and other IWM programs were billed on a fee-for-service basis." *NHDES Report* at 1.

provided by flow control reliant communities are "probably the single most important variable that differentiates public, flow-controlled facilities from private disposal sites." *NHDES Report* at 2. Thus, in contrast to the narrower waste collection-disposal service that underlies Respondent's discrimination claim, communities that rely on flow control provide distinctly different and considerably more comprehensive waste management services. Such substantial dissimilarity precludes "any notion of discrimination." *See General Motors*, 519 U.S. at 298.

In sum, the Sixth Circuit erroneously concluded that Petitioner's flow control ordinance discriminates against interstate commerce.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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Appendix
Descriptions of *Amici Curiae*

Bristol Resource Recovery Facility Operating Committee (BRRFOC) was established in 1985 to advance integrated waste management in fourteen Connecticut cities and towns with an estimated population of more than 300,000. BRRFOC has relied on flow control authority as a fundamental tool for its integrated waste management system, which includes public education on waste reduction and avoidance, recycling and household hazardous waste collection, and a state of the art waste-to-energy (WTE) facility generating electric power for approximately 15,000 homes.

Established in 1972, Cape May County Municipal Utilities Authority (CMCMUA) provides solid waste management (and sanitary wastewater treatment) for all municipalities of Cape May County, New Jersey (peak summer population of more than 600,000). CMCMUA's integrated solid waste management system, which has traditionally relied on flow control, includes a sanitary landfill and waste transfer station, as well as aggressive recycling (which achieved a 59% recycling rate in 2005), waste reduction and reuse and household hazardous waste collection programs (CMCMUA also reclaims energy through landfill gas recovery). CMCMUA's system fee on solid waste disposal subsidizes all recycling, waste reduction and educational programs.

The Delaware County Solid Waste Authority was established in 1954. Serving a county of more than 555,000 residents in populous southeastern Pennsylvania, the Authority's integrated waste management programs were established in reliance on flow control authority and emphasize waste reduction and recycling and the use of best available technology, including a modern WTE facility that began operation in 1992.

Formed in 1959, the Greater Lebanon Refuse Authority (GLRA) serves twenty-six municipalities in south-central Pennsylvania. GLRA has relied on flow control authority to provide environmentally advanced integrated waste management for its residents and businesses. Those programs include an aggressive recycling program (which achieved a 58% recycling

rate in 2005), composting, operation of a modern landfill and a renewable energy power production facility (fueled by landfill gas).

Montgomery County, Ohio provides integrated solid waste management for the approximately 500,000 residents of the Greater Dayton area, including various recycling, waste reduction and waste disposal services. The County's innovative waste management solutions date back to the 1960s with the construction of two waste combustion facilities that began operation in 1970. Despite long-term reliance on flow control authority, the uncertainties associated with the *C&A Carbone* decision prevented the County from proceeding with planned retrofits of its waste combustion plants.

Snohomish County, Washington (population approximately 650,000) is in the central Puget Sound region approximately 30 miles north of Seattle. The County disposes of municipal solid waste generated within its borders through a competitively bid contract. The County works in cooperation with its cities and towns to provide environmentally responsible solid waste disposal, solid and household hazardous waste recycling, prevent illegal dumping, and assure cleanup and monitoring of closed landfills.

The Solid Waste Authority of Central Ohio (SWACO) serves Franklin County (Columbus) and parts of five surrounding counties, with a population of over 1.2 million. Since its inception in 1989, SWACO has been a catalyst for recycling and cutting-edge programs to find new uses for waste. Despite long-term reliance on flow control, uncertainties resulting from the *C&A Carbone* decision prevented SWACO from upgrading its 2,000 ton-per-day WTE plant, which was instead required to shutdown. Today SWACO's comprehensive solid waste management plan addresses operation of its landfill and transfer stations and provides a variety of recycling and waste minimization services.

Serving a population of 270,000, the Solid Waste Disposal Authority of the City of Huntsville, Alabama operates a 690 ton-per-day WTE (steam) plant, curbside recycling, landfill gas recovery, metals recovery, sewage sludge incineration, and household and household hazardous waste programs. In reliance on flow control, the Authority has issued $121 million in bonds,

and all Authority services are financed from system fees and steam sale proceeds.

Protection of the environment was a primary consideration in the development of the Spokane Regional Solid Waste System (RSWS) by the City of Spokane and Spokane County, Washington. Reliance on flow control authority and an integrated system fee have been principal factors in implementing the Spokane RSWS, which provides regional solid waste reduction, recycling, recovery of energy from waste, composting and household hazardous waste collection in an environmentally safe and cost-effective manner.

The York County Solid Waste and Refuse Authority was established in 1971 to assure environmentally sound management for all municipal solid waste generated in York County, Pennsylvania. Serving a population of more than 400,000, from its inception the Authority's programs have emphasized waste reduction and recycling and use of best available technology, which led to development of a modern WTE facility that began operation in 1989. To avoid reliance on taxes while securing sufficient revenue to support WTE technology's greater cost (as well as the cost of recycling and household hazardous waste collection programs, which are provided without charge), York County adopted flow control in 1989 with the full endorsement of the affected communities.